Supreme Court, U.S.
FILED

96 58 JUL 1 1996

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No. 96-

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

MICHELE HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA
and RICHARD JOSEPH KONES,

Respondents.

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Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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ANNA M. DURBIN
Counsel of Record
PETER GOLDBERGER
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

Attorneys for Petitioner

June 1996

QUESTIONS PRESENTED

1. Does the Victim Witness Protection Act, 18 U.S.C. §§ 3663-3664, authorize an award of restitution in a mail fraud case to an innocent person whom the defendant physically harmed (rather than defrauded) during and in furtherance of the execution of his criminal scheme?

2. Should a sentencing court refuse to accept a guilty plea agreement which violates 18 U.S.C. § 3572(b) by expropriating all the defendant's reachable assets to pay the federal government millions in back taxes, a fine and a criminal forfeiture, without awarding restitution to a victim of the defendant's criminal conduct?

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LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Harris and the two parties who opposed her claim: the United States and defendant Kones). Petitioner knows of no related cases.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHELE HARRIS respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on February 20, 1996, affirming the disallowance of her claim for restitution as the victim of criminal conduct in a federal case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (per Stapleton, J., with Sarokin, J., and Sloviter, Ch.J.), affirming the denial of petitioner's claim for restitution in connection with the criminal sentencing of respondent Kones in the United States District Court for the Eastern District of Pennsylvania, was filed on February 20, 1996. It is published as United States v. Kones (Appeal of Harris), 77 F.3d 66 (3d Cir. 1996); a copy is attached as Appendix A. The district court wrote no opinion; its pertinent ruling is reprinted as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 20, 1996. On

April 1, 1996, the court of appeals denied petitioner's timely-filed petition for rehearing. Appendix C. This petition is filed on or before the 90th day thereafter. Rules 13.1, 13.3. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF STATUTES AND SENTENCING GUIDELINE PROVISIONS INVOLVED

The Victim Witness Protection Act, sections 3663-3664 of Title 18, United States Code, provided (at the time of the offense and sentencing here involved), in pertinent part:

§ 3663. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title ... may order, in addition to ... any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

(2) For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant --

* * *

(2) in the case of an offense resulting in bodily injury to a victim ... --

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care ...;

* * *

(C) reimburse the victim for income lost by such victim as a result of such offense;

* * *

(4) in any case, reimburse the victim for lost income ..., transportation, and other expense related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; ...

* * *

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

* * *

§ 3664. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3663 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

* * *

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

* * *

In sections 3553(a)(7) and 3572(d) of Title 18, the Sentencing Reform Act also provides:

> **§ 3553. Imposition of sentence**
>
> (a) **Factors to be considered in imposing a sentence.** -- ... The court, in determining the particular sentence to be imposed, shall consider --
>
> * * *
>
> (7) the need to provide restitution to any victims of the offense.
>
> * * * *
>
> **3572(d). Imposition of a fine and related matters.**
>
> * * *
>
> (b) **Fine not to impair ability to make restitution.** -- If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.
>
> * * * *

The United States Sentencing Guidelines provide, in pertinent part:

> **USSG § 5E1.1.** <u>Restitution</u>
>
> (a) The court shall --
>
> (1) enter a restitution order if such order is authorized under 18 U.S.C. §§ 3663-3664; ....
>
> * * * *

(b) Provided, that the provisions of subsection (a) do not apply ... to the extent the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process.

(c) If a defendant is ordered to make restitution and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

* * * *

§6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)

* * * *

(c) In the case of a plea agreement that includes a specific sentence [Rule 11(e)(1)(C)], the court may accept the agreement if the court is satisfied either that:

(1) the agreed sentence is within the applicable guideline range; or

(2) the agreed sentence departs from the applicable guideline range for justifiable reasons.

STATEMENT OF THE CASE

The petitioner, Michele Harris, claimed restitution under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. §§ 3663-3664, at respondent Richard Kones' guilty plea and sentencing, on the basis that she was a victim of his mail fraud scheme. The fraud scheme involved submission of false bills to insurance companies for allegedly treating patients and netted Kones, a medical doctor, approximately $2 million from many victims. Respondent Kones induced petitioner to become one of his patients; her injuries and losses were caused by harmful treatment Kones inflicted on her, so that he could continue to submit fraudulent billings pursuant to the scheme.

A. Procedural History

On May 24, 1994, respondent Richard Kones, M.D., was taken into custody on a complaint and warrant. After bail of $2 million cash was set and posted, the government appealed and obtained a detention order, with the $2 million remaining in the registry of the court. A federal grand jury sitting in the Eastern District of Pennsylvania returned a 200 count mail fraud indictment against Kones on June 22, 1994. The indictment charged that between February 15, 1991, and the date of the indictment, respondent Kones used the mails to submit in excess of $1

million in fraudulent claims to insurance companies, in violation of 18 U.S.C. § 1341.

Paragraph 14 of the indictment specifically charged that Kones submitted false claims to Independence Blue Cross totalling approximately $85,072 for services he claimed to have rendered to petitioner Harris when she did not in fact visit the medical offices on the dates set forth in the claims. The indictment also charged that Kones offered petitioner approximately $20,000 on or about June 8, 1993, for her to refrain from reporting the fraud to the insurance companies. In fact, when respondent Kones first offered her this bribe, petitioner reported him to the FBI, and then tape-recorded incriminating conversations with him on behalf of the government, including on June 8.

On January 18, 1995, the government filed an additional, three count information against Kones. Incorporating the allegations of the mail fraud indictment, the information charged that he also defrauded the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) and laundered the criminally derived property from the mail fraud scheme. The information included a criminal forfeiture count for $2 million.

On January 23, 1995, respondent Kones pleaded guilty to all counts including the criminal forfeiture. In

this connection, the government entered into a binding plea agreement with Kones pursuant to Fed.R.Crim.P. 11(e)(1)(C), which was accepted by the district court. The agreement called for a sentence within a guideline range of 57-71 months, forfeiture of $2 million, which the government agreed in its discretion under 21 U.S.C. § 853(i)(1) to remit to insurance companies, payment of $1.5 million to IRS to effect a global settlement of Kones' tax liability, special assessments totaling $10,100, surrender of all his licenses to practice medicine in the United States and a fine up to the maximum of $4 million.

Under this agreement, if the court were to order restitution in any amount above the $2 million forfeiture or a prison sentence of over 71 months, then Kones could withdraw his plea. The government promised not to file any further criminal charges as well as not to file any civil suit against Kones, if he repatriated his money and paid the forfeiture and fine within sixty days after sentencing.

Petitioner Harris appeared at the entry of the plea and, by counsel, objected to acceptance of the binding plea agreement, because it did not provide for restitution to her. Prior to sentencing, petitioner filed under seal with the district court two letters, with her affidavit and supporting documents.

CA3 App. Vol. II (under seal). She requested that the court order restitution to her for documented wage loss and medical care as a victim who suffered bodily injury from respondent Kones' criminal conduct in the course of the scheme. 18 U.S.C. § 3663(b)(2).

The sentencing court (Fullam, J.) denied restitution to petitioner, ruling as a matter of law that she was not a "victim" of Kones' mail fraud scheme. Appendix B. The court held that the VWPA should be interpreted to cover only the harm caused by "billing for unnecessary treatment or false billing for treatments that were not rendered." Id. Thus, the only qualified victims were deemed to be the insurance companies and CHAMPUS.

The court sentenced respondent Kones to forfeit $2 million to be used "for restitution" (without specification of victims or amounts of their losses), fined him $4 million, ordered payment of $10,100 in special assessments, and sentenced him to the custody of the Bureau of Prisons for 71 months, to be followed by 3 years' supervised release. Kones surrendered all his licenses to practice medicine in the United States. By agreement of the respondents, the court ordered $1.5 million of Kones' $2 million cash bail, which was held in the registry of the court, to be turned over to IRS in settlement of Kones' tax liabilities.

The district court did not enter any order of restitution under the VWPA. Instead, it hand-wrote, at the request of the defendant, "for restitution" on the order that the Clerk return $500,000 of the cash bail to the United States Marshals, although under 21 U.S.C. § 853(i) that decision is not for the Court to make but rather for the Attorney General.[1] The overall order that respondent Kones forfeit $2 million contains no such limitation.

Petitioner appealed to the United States Court of Appeals for the Third Circuit from the judgments of sentence imposed on respondent Kones, to the extent that they failed to award her restitution under the VWPA. In a published decision (per Stapleton, J., with Sarokin, J., and Sloviter, Ch.J.), the court of appeals affirmed, holding that petitioner did not qualify as a "victim" under the VWPA because she was not injured by the "submission of the insurance claims." App. A11; United States v. Kones (Appeal of Harris), 77 F.3d at 71.

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[1] When petitioner applied for a partial remission of the forfeiture to herself as a victim (as well as in her capacity as an informant), the United States Attorney's Office did not even favor her with the courtesy of an acknowledgement, much less a response.

The court below denied a petition for rehearing, with suggestion for rehearing in banc, on April 1, 1996. App. C.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction of this case under 18 U.S.C. § 3231, in that the indictment alleged offenses against the United States committed in that district. Timely appeals were taken from the district court's May 2 and May 3, 1995, orders imposing sentence, including forfeiture and restitution, but denying restitution to petitioner. Although not a party to the action, petitioner was permitted to appear and participate in the district court; App. B1; CA3 App. 2a, 13a, 84a, 94a; and therefore had standing to appeal. Marino v. Ortiz, 484 U.S. 301 (1988) (per curiam); Karcher v. May, 484 U.S. 72, 77 (1987); Bryant v. Yellen, 447 U.S. 352, 366-67 (1980); cf. Maine v. Taylor, 477 U.S. 131 (1986) (authorized intervenor may pursue appeal of criminal case). Compare United States v. Mindel (Appeal of Atkins), 80 F.3d 394 (9th Cir. 1996). Notice of Appeal was timely filed on May 11, 1995.

B. Statement of Facts

Petitioner sought medical care from respondent Kones, and he prescribed inappropriate synthetic opiates in

inappropriate dosages, to which she became addicted. II CA3 App. 130-33a, Exhibits A, B and G. Kones then billed petitioner's medical insurance company $85,072 for the treatment and for many treatments when she did not see him, but was out of town. II CA3 App. 129-30a. Kones was able to effectuate and continue his scheme to bill for treatment, non-treatment and mistreatment by keeping petitioner on medication that made her dependent on him for more. Respondent Kones did this to her during and in furtherance of his scheme to overbill Blue Cross as charged in the indictment. Blue Cross issued the checks to her, and she signed them over to him.

When she rid herself of the addiction, petitioner noticed the billings where there had been no treatment and confronted Kones. In response, Kones offered her a bribe. II CA3 App. 136a; I CA3 App. 22A, 90a, 97a-98a. She refused the corrupt offer, reported the criminal activity to the government, and taped an incriminating conversation with him for the government.

As a result of the addiction, petitioner lost her responsible employment, and has since been unable to obtain new employment despite heroic effort. II CA3 App. 133-34a, Exhibits D, E, and F. And despite costly weekly psychotherapy, II CA3 App. 137a, she now suffers from severe clinical depression. II CA3 App.

133-37a, 142-48a. Her tax returns show how her income level has not recovered. Exhibits H-L. At the time of his arrest, by contrast, evidence was presented that respondent Kones had either $7.1 or $6.7 million in assets in the Bahamas alone. I CA3 App. 110-11a, 113a. There was no proof of diminished assets at sentencing except for the $2 million bail which was forfeited and the $1.5 million payment to the IRS.

Although Kones's attorneys asserted at sentencing that respondent Kones had $200,000 in malpractice insurance, I CA3 App. 105a, it is not clear that the coverage will reach all the damages caused by Kones' acts which harmed petitioner, particularly if Kones' acts are deemed to have been willful or criminal.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with those of several other circuits in severely restricting the class of "victims" who are entitled to restitution in a federal criminal case, and does so by disregarding or misconstruing all the pertinent statutes and holdings of this Court.

The Court should grant a writ of certiorari in this case to address an important question about the rights of crime victims to receive restitution at

sentencing for a federal crime. Under the decision below, in contrast with those of many other circuits, the will of Congress to make convicted criminals repay their victims' losses will be significantly frustrated.

The injuries that respondent Kones inflicted on petitioner for the purpose of obtaining money by fraud from her medical insurance carrier make her a "victim" of his crimes within the meaning of the Victim Witness Protection Act (VWPA). Since 1982, it has been the law that a federal judge must use the court's sentencing power, to the extent feasible, to provide recovery then and there for a victim of a crime. 18 U.S.C. §§ 3663-3664 (formerly codified at id. §§ 3579-3580)[2]; see also id. §§ 3553(a)(7), 3556; USSG § 5E1.1.

The term "victim" was not explicitly defined in the original, 1982 version of the VWPA. The Senate report accompanying the VWPA "stated that the Committee intended to allow restitution to an injured bank teller when the crime charged was bank robbery and not a crime

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[2] These provisions were again amended, effective April 24, 1996, to further strengthen the rights of the victim. Pub.L. 104-132, §§ 201-207, 110 Stat. 1227-36. Those amendments do not resolve the issues presented in this petition, however.

against the teller, and that the definition of 'victims' is purposely broad to include indirect victims, such as family members of homicide victims." United States v. Hairston, 888 F.2d 1349, 1355 (11th Cir. 1989) (citing S.Rep. No. 532, 97th Cong. 2d Sess. 13, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2519).

The same Senate Report notes that "too often the victim has been the 'forgotten person' in the criminal justice system. With few exceptions, victims and witnesses are either ignored by the criminal justice system or simply used to identify offenders." S.Rep. No. 532, 97th Cong., 2d Sess. 10, reprinted in 1982 U.S.Code Cong. & Admin. News 2516. The purpose of the Act was, inter alia, "to require restitution for crimes, including loss of property or personal injury." Id. at 2515.

Two years later, as part of the 1984 Sentencing Reform Act, Congress adopted 18 U.S.C. § 3572(b), placing a priority on restitution to victims over the imposition of a fine, forfeiture and other monetary penalties:

> If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the

ability of the defendant to make restitution.

In this case, the imposition of $2 million in criminal forfeitures and a $4 million fine, while ordering no restitution, violated the prioritization of penalties mandated by this law. That the district court anticipated the government would remit some or all of the forfeited assets to the insurance company victims pursuant to 21 U.S.C. § 853(i)(1), as made applicable here by 18 U.S.C. § 982(b)(1)(B), "as restitution" does not diminish the violation of § 3572(b), as it worked to the detriment of the petitioner individually. The district court erred under this statute in accepting the collusive plea agreement in this case.

Responding to this Court's decision in Hughey v. United States, 495 U.S. 411 (1990), the VWPA was amended in 1990 to expand the protection for victims in two ways: (1) Instead of limiting restitution to "any victim of such offense," the pre-1990 language, restitution may now be ordered to "any person directly harmed by the defendant's criminal conduct." (2) Restitution is no longer limited to loss caused by the count of conviction where a scheme is charged, but may cover losses caused by that criminal conduct "in" the entire "course of the scheme." Crime Control Act of 1990, Pub.L. 101-647, 104 Stat. 4789, 4863 (1990), amending 18 U.S.C. § 3663(a)(2).

Petitioner was "directly harmed" by respondent Kones' criminal conduct of pretending to treat her for insurance compensation, when he was actually failing to treat her and maltreating her. The medicine he prescribed and directly supplied to her in the course of his scheme to keep her as a patient, so that he, and not some other doctor could bill for her treatment, physically injured her. Nothing in the statutory scheme restricts restitution to the victim specified in the indictment charging the offense of conviction. To the contrary, restitution is to be awarded to "any person directly harmed by the defendant's criminal conduct in the course of the scheme." Petitioner's injuries, which respondent Kones directly caused in furtherance of perpetrating his scheme, entitle her to restitution as a "victim" under the statute.

The decision below conflicts with precedent in other Circuits. Even for pre-1990 crimes, courts ordered restitution paid to victims in positions equivalent to petitioner's. In United States v. Sanga, 967 F.2d 1332 (9th Cir. 1992), the court affirmed an award of restitution for lost wages to a woman who was smuggled into Guam by the defendant. Sanga had kept her as a virtual slave for two years by threatening her life and taking her passport and airline ticket. Then he coerced her into sex to get a

false ID card so she could work outside his house. Sanga pleaded guilty to conspiracy to smuggle aliens. In the narrow view adopted by the Third Circuit here, the crime of smuggling aliens would be an offense against the United States, not against the alien, and restitution would have been denied.

Petitioner's injuries for which she claims restitution were as direct a consequence of respondent Kones' scheme as was the wage loss of the alien smuggled illegally into the United States in Sanga. The overt acts specified in Sanga's indictment were "limited solely to the mechanics of the conspiracy's successful attempt to smuggle her into Guam." Id. at 1334. However, that victim was awarded restitution for wage loss for two years of being kept as a virtual slave as a "direct consequence" of the conspiracy and therefore "flowed from" it. Id. at 1335. Petitioner's injuries were no less a direct consequence of respondent Kones's scheme. The injuries resulted from his acts in furtherance of the scheme -- encouraging her to leave the care of her other doctor, and keeping her under his control and coming back to him, as well as unaware of his wrongdoing, with drugs which harmed her physically and caused her wage loss.

The unreasonably narrow view of who qualifies as a "victim" taken by the

court below conflicts with decisions in other circuits as well. For example, in United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994), the defendant was convicted of making false statements to the FBI and the grand jury by falsely claiming to know the whereabouts of a kidnapped child in hopes of obtaining favorable parole consideration. That court found that the child's mother, who was traumatized by the defendant's actions, qualified as a "direct victim" of the defendant's crimes.

Haggard did not make up an imaginary murder victim; he named a particular child, just as respondent Kones in this case did not make up patients to bill for. Kones pretended to treat petitioner and prescribed medicine which harmed her, all in furtherance of his scheme. In Haggard, the mother's lost income when she was sickened by the stress was a loss "caused by the specific conduct that is a basis of the offense of conviction." Id. at 1329 n.6, quoting Hughey, supra, 495 U.S. at 413. Haggard was not trying to get anything from the child's family, but the conduct of his scheme harmed them, because he used their pain to try to achieve a benefit for himself. The identical relationship exists between respondent Kones' criminal conduct in the course of his scheme to defraud insurance companies and his aggravation of petitioner's medical condition to gain benefits for himself.

Likewise in United States v. Durham, 755 F.2d 511, 512 (6th Cir. 1985), noted without disapproval by this Court in Hughey, supra, 495 U.S. at 415 n.2, a defendant convicted of bank robbery was required to reimburse the insurance company of a third party whose car was taken and destroyed in the course of a getaway from the charged bank robbery. That court properly considered the third party to be a victim of the bank robbery, just as petitioner is a victim of this mail fraud.

Kones' scheme required that he have patients with insurance companies to bill. Although he got his money from insurance companies, his criminal actions in operating his scheme directly harmed his patient, Michele Harris. In Kok v. United States, 17 F.3d 247 (8th Cir. 1994), the Eighth Circuit recognized that criminal conduct which is the basis of an offense which names a particular object of the crime can also harm others in the path of that unlawful conduct. Relying on Hughey, that court upheld, in case of false statements to a financial institution under 18 U.S.C. § 1014, a restitution award not only to the bank which extended a line of credit based on the defendant's false financial representations, but also to the defendant's employer which paid out bonuses based on those misrepresentations.

Under the argument accepted by the sentencing court and adopted below, a

bank teller or customer injured during a robbery would not be a victim entitled to restitution, because the robber was taking the bank's money, and not the teller's. Even the strict reading of the original restitution statute by this Court in Hughey recognized that restitution orders can lawfully reach "the loss caused by the conduct underlying the offense of conviction ..." Hughey v. United States, supra, 495 U.S. at 420 (emphasis added). The law as subsequently amended was intended by Congress to be broader and more sympathetic to victims, not less.

The court below erroneously narrowed the scope of "criminal conduct" giving rise to restitution to "conduct proscribed by the mail fraud statute," which it then defined as "the use of the mails for the purpose of executing a scheme to defraud." App. A11; 77 F.3d at 71. According to the panel, simply because petitioner did not allege she was injured by the "submission of the insurance claims," she is not a victim. Id.

The Third Circuit's unprecedented rule that the criminal acts must be located in the mailing is mistaken. Determinations of harm under the mail fraud statute cannot be limited narrowly to harm caused by the mailings, but must include that caused by "criminal conduct in the course of the scheme." VWPA, § 3663(a)(2). Respondent Kones's treatment

of petitioner was in furtherance of and necessary to continuation of his scheme. The perpetuation of the scheme depended on petitioner's faith in Kones just as passage of title which continued auto dealers' faith was necessary to the perpetuation of the scheme in Schmuck v. United States, 489 U.S. 705 (1989), even though the title passage did not contribute to the duping of dealers or customers.

Respondent Kones's conduct in the course of his scheme of prescribing addictive quantities of synthetic opioids to petitioner to keep her from noticing the overbilling accomplished the same postponement of discovery. Routine or "innocent" mailings that contain no false information may supply the mailing element of a mail fraud scheme. Id. at 714-15. The use of the mails need not be the essence of the offense, as long as the mailing is "incident to an essential part of the scheme." Id. at 711, quoting Badders v. United States, 240 U.S. 391, 394 (1916).

Mailings that "lull the victims into a false sense of security, postpone their ultimate complaint to the authorities and therefore make the apprehension of the defendants less likely than if no mailings had taken place" are within the statute. United States v. Lane, 474 U.S. 438, 451-52 (1986), quoting United States v. Maze, 414 U.S. 395, 403 (1974). This

conduct in furtherance of the scheme was criminal and it harmed petitioner physically; it qualifies as "criminal conduct in the course of the scheme."

Petitioner comes well within the covered side of the distinction between "direct" and "indirect" victims elucidated in the legislative history. The House Commitee explained:

> The use of 'directly' precludes, for example, an argument that a person has been harmed by a financial institution offense that results in a payment from the insurance fund because, as a taxpayer, a part of that person's taxes go to the insurance fund.

H.R.Rep No. 681(I), 101st Cong., 2d Sess. 177 n.8, reprinted in 1990 U.S. Code Cong. & Admin. News 6472, 6583.

Contrary to the suggestion of both courts below, petitioner did not seek as restitution any malpractice damages such as "pain and suffering," but only compensation for wage loss and medical reimbursement, as specifically provided under the VWPA for victims of federal crimes who suffer bodily injury. See 18 U.S.C. § 3663(b)(2). The harm to her was caused directly by Respondent Kones' conduct in furtherance of his criminal scheme. The holding of the Third Circuit flatly ignores the plain meaning of the inclusive language of the VWPA as broadened by Congress in 1990.

The decision below would erect significant hurdles for victims of crime, not even suggested by the plain language of the Victim Witness Protection Act, 18 U.S.C. § 3663, as amended by the Crime Control Act of 1990. The lower court would limit restitution to victims who can establish their claims "without resort to evidentiary hearings" on the issues of fault and causation. App. A9; 77 F.3d at 70. The court would require any restitution award to be based on information "provided by the government and defendant," that is "otherwise generated in the course of the criminal proceedings." App. A6; 77 F.3d at 69; see also App. A12; 77 F.3d at 71. The statutory scheme for sentencing provides no support for this novel straightjacket.

Petitioner's affidavit and exhibits showed that respondent Kones prescribed more than three times the adult dosage for petitioner; a letter from her psychiatrist presented his expert opinion that Kones's treatment of petitioner was not appropriate and contributed to the loss of her job. Tax returns and an expert report documented her wage loss. II CA3 App. 137a; summary at 147a.

The court below relied on one passage in the legislative history of the 1982 statute to posit an expectation of Congress that "entitlement to restitution could be readily determined by the sentencing judge based upon the evidence

he had heard during the trial of the criminal case or learned in the course of determining whether to accept a plea and what an appropriate sentence would be." App. A5; 77 F.3d at 69. That example -- involving the mugging victim whose injuries caused far more loss than the amount of restitution awarded, because she was never interviewed by the prosecutor or probation officer -- was not given by the Committee as an illustration of limits on the scope of the restitution to be allow statute, but rather as an indication of greater solicitude for the actual needs of victims. S.Rep. No. 97-532, 97th Cong., 2d Sess. 30-31.

The lower court's expectation is entirely unrealistic. Evidence of actual loss by victims is not necessary to prove mail fraud at trial, and such "victim impact" testimony as might be admissible, for example, to prove the defendant's specific intent to defraud might nevertheless be held inadmissible under Fed.R. Evid. 403 as more prejudicial than probative. Similarly, it is unnecessary to establish at a guilty plea hearing the identity of victims or the extent of their losses, because that is not an element of the offense. See Libretti v. United States, 516 U.S. --, 133 L.Ed.2d 271, 283-84 (1995). Thus, the information necessary to calculate restitution will often not be developed until the sentencing proceedings, and will often

require an evidentiary hearing. Such hearings, far from prohibited, are obviously contemplated by the statute. 18 U.S.C. § 3664(d).

Defendants frequently object to government requests for restitution, or to the PSI's suggestions on the subject. When this happens, sentencing courts conduct evidentiary hearings, if needed, or make determinations based on documentary submissions. The district court could do the same in this case. The defendant has no absolute right to call live witnesses or to cross-examine witnesses at a sentencing hearing, as the court may consider affidavits and hearsay if they are sufficiently reliable. USSG § 6A1.3(a) (p.s.). In this case, where no liberty interest of Kones was involved in the restitution determination, but only allocation of amounts he had already agreed to pay, there would be no need to "ratchet up" any procedural protections. The proceedings need not be unduly complicated.

The court below raises the question whether a contrary holding would "unduly burden sentencing courts." App. A12; 77 F.3d at 71. This concern cannot justify the rule of blanket prohibition established by the court of appeals; the concern about possible complication is dealt with by a statute which permits the district court to make a case-by-case discretionary judgment. 18 U.S.C. §

3663(d). That was not the basis of the sentencing court's ruling in this case. App. B.

Other circuits have put the focus where Congress intended: fairness to the victim. The holding below, by contrast, would result in relegating the victims to the "forgotten status" which Congress tried to correct in the VWPA. If the government, for whatever strategic or evidentiary reasons, does not put forth an individual as a victim or document his or her losses, the Third Circuit's decision would leave that victim without recourse in a case such as this where the agreement of the government and defendant has divested the defendant of all his reachable assets.[3] The determination of restitution would be dependent on considerations of trial strategy rather than on fairness to victims, in contradiction of the statutory scheme.

The sentence in this case expropriated all of Kones' reachable assets through a fine, return of bail to the IRS, and forfeiture intended to be remitted for the purpose of reimbursement of insurance companies, with restitution allocation left to the prosecutor and not

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[3] The lower court's holding limiting evidence of loss to that presented at the trial or plea was not proposed by any party, either in the sentencing court or in the court of appeals.

the Court. This aspect of the sentence violated the statutory priority Congress established for restitution to individuals physically harmed by the criminal acts of defendants with the ability to pay. The duty of the judiciary to protect the individual victim should not be abdicated.

This case presents the Court with an opportunity to set standards whereby individuals victims will be ensured their rights under federal criminal law, in cases where the government and the defendant, for whatever reason,[4] have crafted an agreement that neglects those important interests. For these reasons, a writ of certiorari should be granted.

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[4] In this case, each side had a powerful pecuniary interest in defeating petitioner's rights as a victim. Respondent Kones benefited by avoiding the application of 18 U.S.C. § 3664(e), under which he would be estopped from denying his conduct in petitioner's civil suit against him. Respondent United States gained control over $7.5 million ($1.5 million in taxes, $2 million in forfeitures, and a $4 million fine) of which some rightfully should have been petitioner's. As the Court has recognized, "it makes sense to scrutinize governmental action more closely when the State stands to benefit." United States v. Good Real Property, 510 U.S. --, 126 L.Ed.2d 490, 505 (1993), quoting Harmelin v. Michigan, 501 U.S. 957, 978 n.9 (1991) (Scalia, J., concurring). Likewise, an

CONCLUSION

For the foregoing reasons, petitioner MICHELE HARRIS prays that this Court grant her petition for a writ of certiorari, vacate the judgment below, and remand with instructions that the United States District Court reform the plea agreement and resentence in order to allow her claim for restitution.

Respectfully submitted,

By: ANNA M. DURBIN
PETER GOLDBERGER
Attorneys for Petitioner

June 28, 1996.

_____(cont'd)

adversarial process "is of particular importance ... where the Government has a direct pecuniary interest in the outcome of the proceeding." Good Real Property, 126 L.Ed.2d at 504.

APPENDIX A

UNITED STATES of America
v.
Richard Joseph KONES,
Michele Harris, Appellant*

Nos. 95-1434 and 95-1435.
United States Court of Appeals,
Third Circuit.

77 F.3d 66

Argued Dec. 5, 1995.
Decided Feb. 20, 1996.

-------- **Page 77 F.3d 67 follows** --------
On Appeal from the United States District Court for the Eastern District of Pennsylvania; John P. Fullam, Judge.

Michael R. Stiles, United States Attorney, Walter S. Batty, Jr., Assistant U.S. Attorney, Chief of Appeals, Edward Zittlau (argued), Assistant U.S. Attorney, Office of U.S. Attorney, Philadelphia, PA, for appellee United States of America.

Laurence S. Shtasel, Blank, Rome, Comisky & McCauley, Philadelphia, PA, Bruce A. Franzel (argued), Oxenburg & Franzel, Philadelphia, PA, for appellee Richard Joseph Kones.

Anna M. Durbin (argued), Pamela A. Wilk, Ardmore, PA, for appellant Michele Harris.

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* Pursuant to Rule 12(a), FRAP.

Before: SLOVITER, Chief Judge, and STAPLETON and SAROKIN, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

Michele Harris appeals the judgment of sentence imposed on Richard Kones. At -------- **Page 77 F.3d 68 follows** ------- sentencing, Harris sought restitution pursuant to the restitution provisions of the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. §§ 3663-3664. The district court concluded that it had no power to order restitution because Harris was not a "victim" of Kones' offenses within the meaning of 18 U.S.C. § 3663(a). We agree with this conclusion and will affirm.

I.

Kones was a medical doctor licensed to practice medicine in the Commonwealth of Pennsylvania when a grand jury indicted him on 200 counts of mail fraud in violation of 18 U.S.C. § 1341. Specifically, the indictment alleged that Kones had submitted over $1,000,000 in false insurance claims based on nonexistent medical services to eighteen of his patients. Harris was one of those patients. According to the indictment, Kones submitted approximately $85,000 in false insurance claims for services that he never provided to Harris.

The government also filed an information adding charges for filing false claims with the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) in violation of 18 U.S.C. § 287 and laundering the funds received from the insurance companies in violation of 18 U.S.C. § 1957. The information sought

criminal forfeiture of $2 million pursuant to 18 U.S.C. § 982.

Kones and the government reached a plea agreement. Kones plead guilty to all counts and agreed to the $2 million forfeiture for purposes of restitution to the health insurance companies which were victims of his fraud, a sentence of between 51 and 71 months in prison, a fine of up to $4 million, a payment of $1.5 million to the IRS to settle outstanding tax claims, a $10,100 special assessment, and the surrender of all of his licenses to practice medicine in the United States.

Before sentencing, Harris filed a claim for $1 million in restitution and submitted supporting affidavits. Harris alleged that Kones gave her prescriptions for excessive amounts of a pain killer. She contended that she became addicted, lost her job, and continues to need psychiatric care. According to Harris, Kones did this in furtherance of his scheme and it was only by inducing her drug dependency that he was able to control her and carry out his fraudulent scheme.

Accepting arguendo Harris' allegations of injury and Kones' motivation in prescribing drugs for her, the district court rejected Harris' claim for restitution and sentenced Kones pursuant to the plea agreement. The district court concluded that it was without power to order restitution to Harris because Harris was not a "victim" of Kones' offenses of conviction within the meaning of 18 U.S.C. § 3663(a).

II.

[1] The district court had jurisdiction pursuant to 18 U.S.C. § 3231 as

Kones was charged with violations of federal law. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review regarding whether a district court has power to order restitution. United States v. Seligsohn, 981 F.2d 1418, 1421 (3d Cir.1992).

III.

A.

VWPA, 18 U.S.C. § 3663(a)(1) provides that a court, "when sentencing a defendant convicted of an offense under this title or section 46312, 46502, or 46504 of title 49, may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense." Thus, in order for a district court to have power to order restitution, the person awarded restitution must be "a victim of such offense." Even where there is a "victim of the offense," § 3663(d) provides that the court may decline to order restitution "to the extent that the court determines that the complication and prolongation of the sentencing process [required to do so] outweighs the need to provide restitution to any victims." We understand this provision to call for a weighing of the burden of adjudicating the

-------- **Page 77 F.3d 69 follows** --------

restitution issue against the desirability of immediate restitution -- or otherwise stated, a weighing of the burden that would be imposed on the court by adjudicating restitution in the criminal case against the burden that would be imposed on the victim by leaving him or

her to other available legal remedies.[1]

The legislative history of the VWPA does not provide a direct answer to the issue posed in this appeal, but it does reflect what Congress contemplated would be involved in making restitution awards and we find this helpful. Nothing in the legislative history evidences an expectation that a sentencing judge would adjudicate, in the course of the court's sentencing proceeding, all civil claims against a criminal defendant arising from conduct related to the offense. Rather, it was expected that entitlement to restitution could be readily determined by the sentencing judge based upon the evidence he had heard during the trial of the criminal case or learned in the course of determining whether to accept a plea and what an appropriate sentence would be. While the original statute, similar to the current version, provided for discretion to decline to grant restitution when it would be an undue burden to do so, this was not because Congress

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[1] Section 5E1.1 of the United States Sentencing Guidelines provides that the sentencing court "shall ... enter a restitution order if such order is authorized under 18 U.S.C. §§ 3663-3664" except to the extent that "full restitution has been made, or to the extent the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process." U.S.S.G. § 5E1.1 (emphasis added).

expected that sentencing judges would be required to hold an evidentiary hearing on liability issues in the course of the sentencing proceedings. As the Senate Report explains, "the Committee added this provision to prevent sentencing hearings from becoming prolonged and complicated trials on the question of damages owed the victim." S.Rep. No. 532, 97th Cong., 2d Sess. 31 (1982), reprinted in 1982 U.S.C.[C.]A.N. 2515, 2537 (emphasis added). The kind of case that Congress had in mind was one in which liability is clear from the information provided by the government and the defendant and all the sentencing court has to do is calculate damages. See id. at 2536-37 (discussing a case where the victim of a purse snatching suffered a broken hip).

This aspect of Congress' expectation is important because it counsels against construing the text of the statute in a way that would bring fault and causation issues before the sentencing court that cannot be resolved with the information otherwise generated in the course of the criminal proceedings on the indictment. We are persuaded that this counsel should guide our interpretation of the restitution provisions of the VWPA.

In Hughey v. United States, 495 U.S. 411, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990), the Supreme Court interpreted the phrase "restitution to any victim of such offense" as used in § 3663(a). Hughey was indicted for three counts of theft by a Postal Service employee in violation of 18 U.S.C. § 1709, and three counts of use of an unauthorized credit card in violation of 18 U.S.C. § 1029(a)(2). After he pled guilty to one count of use of an

unauthorized credit card, the district court ordered restitution for loss caused by all of the counts. Id. at 413-14, 110 S.Ct. at 1981. The Supreme Court held that "such offense" in § 3663(a)(1) refers to the offense of conviction. In other words, Congress authorized restitution "only for the loss caused by the specific conduct that is the basis of the offense of conviction." Id. at 413, 110 S.Ct. at 1981. Accordingly, the district court exceeded its powers when it ordered restitution for similar and related conduct that was not a part of the conduct constituting the offense of which the defendant was convicted. Id. at 422, 110 S.Ct. at 1985.

Not long after the Supreme Court decided Hughey, Congress amended the VWPA by adding 18 U.S.C. § 3663(a)(2) which provides:

> For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any persons directly harmed by the defendant's criminal con-

-------- Page 77 F.3d 70 follows --------

> duct in the course of the scheme, conspiracy, or pattern.

Crime Control Act of 1990, Pub.L. No. 101-647, 104 Stat. 4789, 4863 (1990). This amendment, as Kones stresses, expands the restitution granting authority of district courts beyond that found in Hughey. By its own terms, however, § 3663(a)(2) applies only in cases where a scheme, conspiracy, or pattern of criminal activity is an element of the offense of conviction. In such cases, §

3663(a)(2) authorizes restitution to "any person directly harmed by the defendants' criminal conduct in the course of the scheme, conspiracy, or pattern" that was an element of the offense of conviction.

Section 3663(a)(2) expanded the district courts' restitution powers in such cases to the extent that a district court could order restitution for any harm directly caused by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern, even though such conduct is not "the specific conduct that is the basis of the offense of conviction." See United States v. Seligsohn, 981 F.2d 1418, 1421-22 (3d Cir.1992). For example, where a defendant is convicted of defrauding person X and a fraudulent scheme is an element of that conviction, the sentencing court has power to order restitution for the loss to defrauded person Y directly caused by the defendant's criminal conduct, even where the defendant is not convicted of defrauding Y.

[2][3] This expansion of restitution powers, however, is limited by its terms. Section 3663(a)(2) is not so broad that it permits a district court to order restitution to anyone harmed by any activity of the defendant related to the scheme, conspiracy, or pattern. Rather, in order for restitution to be permissible, the harm must "directly" result from the "criminal conduct" of the defendant. In this context, we interpret "direct" to require that the harm to the victim be closely related to the scheme, rather than tangentially linked.[2]

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[2] The scanty legislative history on point

Further, we interpret "defendant's criminal conduct in the course of the scheme, conspiracy or pattern" to mean conduct that is both engaged in the furtherance of the scheme, conspiracy or pattern, and proscribed by the criminal statute the defendant was convicted of violating.[3] When § 3663 is construed in this manner, restitution liability issues of fault and causation can be resolved on the basis of the evidence tendered by the government and the defendant in the criminal case without resort to evidentiary hearings on these collateral issues.

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provides us with only the following information:

> The use of "directly" precludes, for example, an argument that a person has been harmed by a financial institution offense that results in a payment from the insurance fund because, as a taxpayer, a part of that person's taxes go to the insurance fund.

H.R.Rep. No. 681(I), 101st Cong., 2d Sess. 177 n.8, reprinted in 1990 U.S.C.C.A.N. 6472, 6583 n.8.

[3] We have no occasion here to address, and reserve for another day, the issue of whether in this context "conduct in the course of the ... conspiracy" includes only conduct prohibited by the substantive statute which the co-conspirators conspired to violate.

B.

[4] Here the offense of conviction was mail fraud in violation of 18 U.S.C. § 1341.[4]

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[4] 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or received therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be

-------- Page 77 F.3d 71 follows --------

A person commits mail fraud when she has "devised" or intends to "devise" a scheme to defraud, and she uses the mails for the purpose of executing or attempting to execute the scheme. 18 U.S.C. § 1341; see United States v. Frey, 42 F.3d 795, 797 (3d Cir.1994). Since a scheme is an element of mail fraud, 18 U.S.C. § 3663(a)(2) applies. Harris is not a "victim" of Kones' mail fraud offenses within the meaning of § 3663(a), however.

The conduct that Harris alleges caused her harm is not conduct proscribed by the mail fraud statute. The conduct proscribed by the mail fraud statute is the use of the mails for the purpose of executing a scheme to defraud. Specifically, in this case it is Kones' submission of false insurance claims through the mail. Harris does not allege that she was injured by the submission of the insurance claims. She alleges that she

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> delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Kones also plead guilty to violations of 18 U.S.C. §§ 287 and 1957. However, it is apparent that Harris' alleged injuries are wholly unrelated to the conduct which violated those statutory provisions.

was injured by faulty medical services. While Harris alleges that Kones' provision of drugs to her was malpractice and was done in furtherance of his scheme, the provision of drugs, properly or improperly, is not conduct proscribed by the mail fraud statute.

[5] Thus, we agree with the district court that "victim" within the meaning of § 3663(a)(1) and (a)(2) does not include a person who has experienced no harm arising from the criminal conduct that gives rise to the offense of conviction. As the facts of this case illustrate, to hold otherwise would unduly burden sentencing courts. No information developed in the course of these proceedings provided the district court with a basis for adjudicating whether Kones' treatment of Harris was legal or illegal, was consistent or inconsistent with medical standards prevailing in the community, or was or was not causally related to the injuries she allegedly suffered. As the district court aptly observed, it could not grant Harris' restitution request without fully litigating a tangentially related medical malpractice case as a part of the sentencing process.

IV.

For the foregoing reasons, we will affirm the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
vs.	:	NO. 94-266
RICHARD JOSEPH KONES	:	INFORMATION NO. 95-37

Philadelphia, Pennsylvania
May 2, 1995

BEFORE: HONORABLE JOHN P. FULLAM,
SENIOR JUDGE

SENTENCING

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* * *

APPEARANCES:

EWALD ZITTLAU, ESQ.
Assistant United States Attorney
[address omitted]
For the Government.

LAURENCE S. SHTASEL, ESQ.
BLANK, ROME, COMISKY & MCCAULEY
[address omitted]
and
BRUCE A. FRANZEL, ESQ.
OXENBURG & FRANZEL
[address omitted]
For the Defendant.

ANNA M. DURBIN, ESQ.
[address omitted]
For victim Michele Harris.

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* * *

[14]

THE COURT: * * *

All right, my ruling is not going to be pleasing; but it is:

As I understand the statute, the only victims who are entitled to restitution in the criminal proceeding are those who were directly harmed by the Defendant's criminal conduct.

The criminal conduct in this case has to do with the billing for unnecessary treatment and the false billing for treatments that were not rendered.

The criminal conduct does not have anything to do with how he treated particular patents.

I, therefore, conclude as a matter of law that Ms. Durbin's client does not qualify as a victim.

I will now hear any argument that the Government may make and also anything that the Defendant or defense counsel may have to say as to what the appropriate sentence or disposition of this case would be. * * * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 95-1434 and 95-1435
UNITED STATES OF AMERICA
V.
RICHARD JOSEPH KONES
Michele Harris
Appellant*
*Pursuant to Rule 12(a), FRAP

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN,
GREENBERG, SCIRICA, COWEN,
NYGAARD, ALITO, ROTH, LEWIS,
McKEE, and SAROKIN,
Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/Walter K. Stapleton

Dated: APR 01 1996